The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE
1401 H Street, NW, Washington, DC 20005 USA

March 4, 2025

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1091

Re: In the Matter of FS Credit Opportunities Corp., *et. al* (SEC Accession No. 0001193125-25-030936)

Dear Ms. Countryman:

The Investment Company Institute[1] is writing in support of approving the application before the Securities and Exchange Commission (SEC) filed by FS Credit Opportunities Corp., *et. al*, on February 21, 2025, relating to co-investment exemptive relief ("FS Co-Investment Application").[2] ICI is in support of the advancement of the conditions laid out in the FS Co-Investment Application and believes approving co-investment applications with those conditions on a going forward basis—or otherwise providing class relief consistent with those conditions—would reflect a more principles-based co-investment framework, like that previously advocated by ICI and discussed in engagement meetings with SEC Staff during the summer of last year. ICI thoroughly supports the proposed improvements relative to the existing inflexible co-investment framework and believes the FS Co-Investment Application represents a significant step in the right direction.

However, ICI emphasizes that the FS Co-Investment Application should be viewed as only the first step in the long-overdue modernization of these applications and the co-investment framework more broadly. Co-investment opportunities present significant benefits to the ability of investors to participate in diversified investments and facilitate U.S. capital formation. Cumbersome exemptive

[1] The Investment Company Institute (ICI) is the leading association representing the asset management industry in service of individual investors. ICI's members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in other jurisdictions. Its members manage $39.1 trillion invested in funds registered under the US Investment Company Act of 1940 (1940 Act), serving more than 120 million investors. Members manage an additional $9.6 trillion in regulated fund assets managed outside the United States. ICI also represents its members in their capacity as investment advisers to collective investment trusts (CITs) and retail separately managed accounts (SMAs). ICI has offices in Washington DC, Brussels, and London.

[2] In the Matter of FS Credit Opportunities Corp., *et. al*, Application for an Order Pursuant to Sections 17(d) and 57(i) of the Investment Company Act of 1940 and Rule 17d-1 under the Investment Company Act of 1940 Permitting Certain Joint Transactions Otherwise Prohibited by Sections 17(d) and 57(a)(4) of Rule 17d-1 Under the Investment Company Act of 1940, SEC Accession No. 0001193125-25-030936 (filed Feb. 21, 2025), *available at* https://www.sec.gov/Archives/edgar/data/1501729/000119312525030936/d909521d40app.htm.

relief interferes with these benefits, and we believe the SEC Staff should remain committed to working toward further improvements after the FS Co-Investment Application is granted, including through considering further amendments to exemptive relief and potential amendments to Rule 17d-1.

We further request that the SEC take steps to make the revised co-investment relief immediately available to all funds that have the existing form of the relief. This is essential to ensure that the benefits of the revised relief are available promptly to all interested market participants. Processing individual applications for the amended relief serves no substantive purpose, and the SEC and its Staff have at their disposal tools to avoid the expense and delay of such a process. For example, the SEC or its Staff could provide no-action relief to permit any fund with existing relief to rely on the revised conditions or could issue a class order with similar effect.

Background

Co-investment relief has become a virtual necessity for managers of regulated funds[3] investing in privately placed assets, in particular managers of private credit focused closed-end funds and BDCs. Managers of such regulated funds frequently also manage private funds with overlapping investment strategies. The terms of originated investments to be allocated across the regulated funds and private funds are typically negotiated. Thus, those originated investments are often completed pursuant to co-investment orders because Section 17(d) of the 1940 Act, in accordance with SEC guidance on joint transactions, could otherwise be deemed to prevent such transactions.

The existing co-investment regime is a body of highly technical exemptive applications and orders that has resulted in the development of more than a dozen required conditions and sub-conditions to be satisfied for any particular transaction. For example, the existing co-investment regime requires the board of each regulated fund to consider and approve transactions under a co-investment program, which under some programs requires board members to be "on call" to provide approval of individual deals within a matter of hours (potentially multiple times a week and sometimes per day) or regulated funds risk losing out on time-sensitive investment opportunities.[4]

Further, depending on which parties invest at which times and in which securities, a number of otherwise common transactions are prohibited by the existing co-investment order regime, in our view without any corresponding investor protection benefit. For example, a regulated fund is

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[3] "Regulated funds" includes investment companies registered under the 1940 Act and closed-end companies that have elected to be regulated under the 1940 Act (*i.e.,* business development companies (BDCs)).

[4] By analogy, the SEC chose to modernize the role of the board in valuing fund assets, recognizing that boards should delegate daily oversight to others, while retaining effective oversight (*e.g.*, specific and detailed reporting). *See* Good Faith Determinations of Fair Value, Investment Company Act Release No. 34128, 86 Fed. Reg. 748 (Jan. 6, 2021). Requiring approval of individual deals and daily oversight of specific investments detracts from fund boards' time and attention on the matters where they add the most value to investors, including high-level oversight of fund governance, processes, and controls. The FS Co-Investment Application appears to address these board oversight issues and align with the oversight often required of the board under other rules.

generally prohibited from investing in reliance on existing co-investment relief if any affiliate has any pre-existing investment in the issuer, even if just one share. This prohibition is the proverbial hammer to swat a fly, preventing an entire category of investments out of a concern that some may present conflicts of interest. It fails to account for the fact that both borrowers and funds have capital needs and lifecycles that do not always perfectly synchronize, cutting off opportunities (including the ability of a regulated fund's board to exercise its discretion) simply because a fund may not have invested in an earlier financing or capital raise.

While the FS Co-Investment Application is unequivocally a step in the right direction in resolving some of the aforementioned undesirable results for retail investors, it does not resolve every issue. After that application is granted, there would still remain various unsolved issues related to co-investment that ICI and the industry hope to engage the SEC Staff on, in particular:

- **Same Terms, Same Price, Same Class, Same Security**: This condition imposes rigid constraints on a fund manager's ability to structure transactions and allocate investments widely across their client base. For example, this condition often prevents funds investing under a co-investment order from participating in otherwise attractive investment opportunities, such as in warrant allocations or "equity kickers" when engaging in debt originations or participating in a term loan and credit revolver alongside private funds. ICI looks forward to engaging on this issue to allow for such investment opportunities while providing oversight, for example, via a role for the board in approving transactions where there are different terms, price, class, and/or security provided doing so is in the best interest of the fund.

- **Principal Transaction Issues**: The lack of Section 17(a) relief often limits regulated funds from providing private equity strategies where the 1940 Act's strict affiliation definitions treat portfolio companies as affiliates. The SEC has recognized the value of exemptions to these strict prohibitions in the past, and ICI believes there could be a solution to this issue by utilizing an expanded framework based on that found in Rule 17a-6 or Rule 57b-1.

- **Transaction Fee Conditions**: Further clarity on how this condition applies to affiliates acting as an administrative agent on a loan or a property manager on a real estate investment would be beneficial.

- **Entities Available to Rely on the Relief**: It appears that entities that do not meet the definition of "investment company" under Section 3(a), in particular conglomerate and operating companies registered solely under the Securities Act of 1933, are not explicitly included in the definition of "Affiliated Entity" in the FS Co-Investment Application. Further expansion to such entities would be appropriate.

Assuming the SEC Staff moves forward with approving the FS Co-Investment Application, which ICI supports, we would hope that the SEC Staff provides the same relief in a timely and equitable manner to other issuers. While ICI supports the FS Co-Investment Application, it is important that the industry as a whole is on a level playing field and that all industry participants are able to

operate under the same conditions as those in the FS Co-Investment Application. For this reason, ICI supports a class order or no-action relief allowing any fund or asset manager with an existing co-investment order to engage in co-investment transactions in reliance on the conditions in the FS Co-Investment Application, similar to action taken by the Commission recently in other contexts, such as with respect to insurance product fund substitutions.[5] However, if the SEC or Staff does not want to issue class relief, ICI believes similar (*i.e.* "copycat") co-investment applications should be approved on an expedited or quicker basis.

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We appreciate the opportunity to comment and urge the SEC Staff to approve the FS Co-Investment Application and then engage the industry on the issues described above. If you have any questions, please contact Paul G. Cellupica, General Counsel, at paul.cellupica@ici.org, and Kevin Ercoline, Assistant General Counsel, at kevin.ercoline@ici.org.

Regards,

/s/ Paul G. Cellupica
Paul G. Cellupica
General Counsel

/s/ Kevin Ercoline
Kevin Ercoline
Assistant General Counsel

cc: The Honorable Mark T. Uyeda, Acting Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
Natasha Vij Greiner, Director, Division of Investment Management
Kaitlin Bottock, Co-Chief Counsel, Division of Investment Management

[5] Commission Statement on Insurance Product Fund Substitution Applications, Investment Company Act Release No. 34199 (Feb. 23, 2021).